88-945

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALINE ERVIN,
Petitioner,

vs.

COUNTY OF LOS ANGELES,
a chartered governmental entity,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Has the Ninth Circuit Court of Appeals deviated from this Court's mandate to apply state law as declared by the highest court, to Petitioner's Civil Rights claims? Specifically, does California's doctrine of equitable tolling of the statute of limitations, apply to claims:

(1) Where Respondent Los Angeles County ("County"), received early and timely notice through the filing of a government tort claim and state court action;

(2) Where the Respondent had the opportunity to identify and preserve evidence for its defense (which evidence had been and is within its exclusive control and possession); and

(3) Where the Petitioner acted reasonably and in good faith in filing

her state and subsequent federal lawsuits.

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OPINIONS BELOW

The opinion of the Court of Appeals in this case is reported as Aline Ervin v. County of Los Angeles, a charted governmental entity, ____ F.2d ____, No. 87-5871 (9th Cir. 1988), and is attached hereto as Appendix A at pp. A1-A4. The appellate court's order denying the Petition for Rehearing, with suggestion for Rearing En Banc, was filed on August 16, 1988 and is attached hereto as Appendix B at B1.

No written opinion was rendered by the District Court for the Central District of California. An order and a transcript of the oral ruling by the district court are attached hereto as Appendix C and D, respectively.

JURISDICTION

The judgment of the Court of Appeals

for the Ninth Circuit was entered on June 13, 1988. [Appendix A.] A timely petition for rehearing and suggestion for rehearing en banc was denied and filed by the Court of Appeals on August 16, 1988. [Appendix B.] This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent text of the following provisions is set forth in Appendix E to this petition:

United States Constitution

Fifth Amendment

Eighth Amendment

Fourteenth Amendment

United States Code, Title 42, Section 1983

United States Code, Title 42, Section 1988

STATEMENT OF THE CASE

The Petitioner seeks review of the appellate decision which deviated from this Court's mandate to apply state law, as declared by the highest court, to Petitioner's Civil Rights claims. The petition is brought by a black woman whose youngest son was killed by the intentional acts and omissions of the Respondent, County of Los Angeles. These proceedings focus on the interpretation, meaning and scope of California's doctrine of equitable tolling of the statute of limitations, as it is applied to the Petitioner's Federal Statutory and Constitutional claims.

Petitioner, Ms. Aline Ervin, brought this action in her capacity as

mother and heir for her deceased son, Clifford Roy Spears. These claims represent their last resort in an attempt to redress the violations of their rights. Their claims are based on the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and on the Civil Rights Act, Title 42 of the United States Code, §§ 1983 and 1988.[1]

In sum, while in the custody and care of the County, Clifford Roy Spears was murdered. His death was the direct and proximate result of the intentional acts and omissions of the County, its agents and employees. Within six weeks of Spears's death, Mrs. Ervin timely filed a claim for damages pursuant to California's Government Code claims

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[1] It is these claims that form the basis of federal jurisdiction in the court of first instance.

procedures. The County rejected Mrs. Ervin's claim, requiring her to file a state court action. This complaint was timely filed, only three months after her son's death. The state action was pending in the Superior Court of California when Petitioner filed the present federal lawsuit.

However, before the merits of the case were reached, the County moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b). The County claimed that the statute of limitations had expired on the Statutory and Consitutional claims, and that the statute was not tolled by California's doctrine of equitable tolling. The motion was granted. Hence, the appeal and this petition for review.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Has Deviated From This Court's Mandate To Apply State Law As Declared By The Highest State Court.

In suits brought under 42 U.S.C. section 1983, federal courts are obligated to apply the states' rules for tolling the statute of limitations. Board of Regents v. Tomanio, 446 U.S. 478, 483, 100 S.Ct. 1790, 1795 (1979). Wilson v. Garcia, 471 U. S. 261, 269, 105 S.Ct. 1938, 1943 (1985).

Once it is clear that a federal court must apply state law, the court must decide the content of the state law to be applied. Wright, Miller & Cooper, 19 Federal Practice and Procedure, Jurisdiction section 4507, p.80-81 (1982). On that basis, the Ninth Circuit itself has held that "we are, of course, bound to follow an interpretation of

state law by the highest state court. West v. American Telephone & Telegraph Co., 311 U. S. 223, 236, 61 S.Ct. 179, 183 (1940); Erie Railroad Co. v. Tompkins, 304 U. S. 64, 78, 58 S.Ct. 817, 822 (1938)." Aydin Corp. v. Loral Corp., 718 F.2d 897, 904 (9th Cir. 1983). See also Olympic Sports Prod. v. Universal Athletic Sales, 760 F.2d 910, 915 (9th Cir. 1985).

Therefore, a federal court must apply California's doctrine of equitable tolling as declared and interpreted by the California Supreme Court. See Jones v. Tracy School Dist., 27 Cal.3d 99, 165 Cal.Rptr. 100 (1980); Addison v. State of California, 21 Cal.3d 313, 146 Cal.Rptr. 224, 578 P.2d 941 (1978); and Elkins v. Derby, 12 Cal.3d 410, 115 Cal.Rptr. 641, 525 P.2d 81 (1974).

A. Despite The Decision Below, California's Doctrine of Equitable Tolling Applies to Mrs. Ervin's Important Federal Claims.

The appellate decision below held that the doctrine of equitable tolling did not apply to the Petitioner's claims. That decision was based, in critical part, on an intermediate appellate decision and another Ninth Circuit decision. Petitioner asserts that a decision cannot be made without careful analysis of the state's supreme court decisions on this issue.

The application of the doctrine of equitable tolling requires timely notice, lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff. Addison, 21 Cal.3d at 319. Furthermore, the two actions need not be identical. Elkins, 12 Cal.3d at 413. (Emphasis added.)

In Addison, the California Supreme Court held that the filing of an action in the United States District Court suspended the statute of limitations for state claims while a federal case was pending. Addison, 21 Cal.3d at 315. In suspending the statute, the Court applied its "well established doctrine of 'equitable tolling'". Id. at 316. It reasoned that courts have adhered to a general policy which favors relieving plaintiffs from the bar of a limitations statute when, possessing several legal remedies he [or she], reasonably and in good faith, pursues one designed to lessen the extent of his [or her] damages. Id. at 317.

More specifically, the Court applied what has become known as a three prong

test.[2] First, it held that since the initial federal action was timely filed, the defendants were adequately notified of the possible claims against them. The court stated, "[u]nquestionably, the same set of facts may be the basis for claims under both federal and state law." Id. at 319.

Second, the Court held that the defendants suffered no prejudice. It reasoned that since the first federal court action was timely filed, the defendants had the opportunity to gather evidence and prepare a defense against potential claims. Id.

Third, the Court held that the plaintiffs acted reasonably and in good faith because the state action was filed

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2 See Mercury Casualty Co. v. State Bd. of Equalization, 179 Cal.App.3d 34, 42, 224 Cal. Rptr. 781 (1986).

only one week after the federal action was dismissed. Id. Therefore, the Court applied the doctrine of equitable tolling to prevent the plaintiff's claims from being time-barred.

The present case presents substantially the same set of facts and circumstances as in Addison. It is uncontested that Mrs. Ervin timely filed her state court complaint on June 8, 1983, less than four months after the attack. Indeed, the state court action was pending when this action was instituted. As in Addison, the County knew, or should have known, that the same set of facts might be the basis for claims under both federal and state law. The fact that the claims are not identical is of little moment as the California Supreme Court previously held. Elkins, 12 Cal.3d at 413. Thus, the

County had sufficient and adequate notice of Mrs. Ervin's federal claims.

Next, the County cannot claim or assert prejudice. The timely filing of Ervin's state complaint gave it ample opportunity to gather evidence, and to prepare its defense. Indeed, since the attack on Spears, the County has had sole control and custody of all relevant evidence locked behind its jail house doors. Again, Addison and Elkins held that it makes no difference that the two claims are different. Elkins, 12 Cal.3d at 413.

Finally, Mrs. Ervin satisfies the so-called third prong. She acted reasonably and in good faith in the filing of her second complaint. In Addison, reasonable and good faith was measured by a one week delay. Here, Mrs. Ervin did not wait for the dismissal of

the state action, she filed the second action while the first was still pending. Thus, the requirement of the third prong is satisfied.

It is apparent, therefore, based on California Supreme Court authority and reasoning that the facts and circumstances surrounding Mrs. Ervin's claims require the application of California's doctrine of equitable tolling. Similarly, the Supreme Court in Elkins held that if the defendant was not prejudiced, the running of the limitations period is tolled "[w]hen an injured person has several legal remedies and, reasonably and in good faith pursues one." Elkins, 12 Cal.3d at 414.

In Elkins, the Court tolled the statute of limitations for an injured employee while he pursued a workers' compensation claim which arose out of the

same accident. Elkins, 12 Cal.3d at 420. The court reasoned that a plaintiff should not be barred by a statute of limitations unless the defendant would be prejudiced if the plaintiff were allowed to proceed. Id. at 414. As stated above, the court in Elkins also held that the two actions need not be identical. Elkins, 12 Cal.3d at 413.

As previously observed, Mrs. Ervin had several legal remedies and timely pursued one action in state court to lessen the extent of her damages. The County cannot claim prejudice because it had timely and adequate notice of Ervin's claims which arose out of the death of her son.

The overwhelming California Supreme Court authority, therefore, compels the application of the doctrine of equitable tolling to Mrs. Ervin's federal claims.

The California Supreme Court reaffirmed its doctrine of equitable tolling in Jones, 27 Cal.3d at 99. And, as recently as 1986, the California Court of Appeals reaffirmed the holding in Addison and the doctrine of equitable tolling in Mercury Casualty Co., 179 Cal.App.3d 34 (1986). Thus, the lower appellate decision should be reviewed to ensure that federal courts are applying state law as set forth by that state's supreme court.

II. The Decision Below Mistakenly Relied On An Intermediate California Appellate Case.

A. The Loehr Case Is Not Controlling And Should Not Have Been Relied Upon By The Court Below.

There are only three things that must be shown in order for the statute of limitations to be equitably tolled:

(a) timely notice to the

defendant;

(b) lack of prejudice to the defendant's position; and

(c) reasonable and good faith conduct on the part of the plaintiff.

Addison, 21 Cal.3d at 319.

Thus, under California law there are no qualifications or exceptions to this rule. Also see Jones, 27 Cal.3d at 107-109; Elkins, 12 Cal.3d at 413; and Bollinger v. National Fire Ins. Co., 25 Cal.2d 399 (1944).

The Court below, however, found support for a qualification in one intermediate appellate court, Loehr v. Ventura Community C. Dist., 147 Cal.App.3d 1071, 1086, 195 Cal.Rptr. 576 (1983). Such reliance by this Court is erroneous for two important reasons.

First, the federal court is "bound

to follow an interpretation of state law by the highest state court. (Citations omitted)." Aydin Corp. v. Loral Corp., 718 F.2d 897, 904 (9th Cir. 1983). Further:

> Where an intermediate appellate court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court would decide otherwise. (Citations omitted.) (Emphasis added.)

West v. A.T. & T. Co., 311 U.S. at 237.

In the present case, the previous California Supreme Court cases[3] do not set forth or imply that there are any exceptions or qualifications to the equitable tolling doctrine. Ervin, therefore, maintains that this alone is

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[3] Jones, supra., Addison, supra., Elkins, supra., and Bollinger, supra..

persuasive data that the intermediate court decision should be disregarded. The Court below should not have considered Loehr in rendering its decision. That case is contrary to existing California Supreme Court authority and an apparent anomaly in California law.

B. Loehr Should Not Be Relied Upon Because It Is Factually Distinguishable From The Present Case.

The court below held that, "a plaintiff who allegedly suffered several different wrongs [and] pursues only one remedy as to one of those wrongs" cannot benefit from the doctrine of equitable tolling; citing Loehr, 147 Cal.App.3d at 1086. Ervin v. County of Los Angeles, No. 87-5871, 6881 (9th Cir. 1988).

The Loehr case is substantially

different from Petitioner's case in many important respects. First, Loehr was a case where a plaintiff first pursued a civil rights case and then pursued claims based on breach of contract, wrongful termination and injunction. The Court in that case reasoned:

> Each of the causes of action asserted in the complaint at issue here [the state complaint] is predicated upon a different wrong and based on a set of facts independent of those set forth in plaintiff's [first] suit under the federal Civil Rights Act. Loehr, 147 Cal.App.3d at 1085.

Moreover, the Court there held "a comparison of the federal and state court actions demonstrates that the two are substantially dissimilar as to both the remedies they seek and the wrongs they allege." Id. at 1086.

The case at bar presents a substantially, different fact pattern and

circumstances. Here, Ervin is seeking substantially identical remedies and is alleging the same basic wrongs. A careful review of the two complaints will support this contention. Unlike Loehr, Ervin did not first pursue claims sounding in tort, and then claims sounding in contract and injunction. She has always pursued claims based on the same tortious conduct of the County. Further, she has always claimed the same remedies, money damages.

The rationale for tolling is further supported when another distinction in Loehr is examined. In that case, the court also held that equitable tolling was not appropriate because the different claims and remedies pursued by the plaintiff were based on substantially different theories, ie., tort versus contact; and would depend on

substantially different evidence. Loehr, 147 Cal.App.3d at 1085. However, as pointed to above, Ervin's claims are so substantially similar that the same evidence which would support or discount her state claims would also provide the same for her federal claims.

More importantly, the sequence of cases and forums is a significant factor which cannot not be disregarded. In Loehr, the plaintiff filed a complaint in federal court alleging civil rights violations and then filed a state court action sounding in contract. Loehr, 147 Cal.App.3d at 1077.

Here, Ervin did not file a civil right's action until after discovery was conducted in the state case. At the time the state action was filed, Ervin had no facts to support the civil rights claims. The subsequent depositions of various

prison officials uncovered important facts which supported her subsequent constitutional claims. Thus, Ervin had no real opportunity to pursue her federal claims until discovery was conducted.

These distinctions, combined with the California Supreme Court's holding in Elkins, 12 Cal.3d at 413, that "the two actions need not be identical" supports the contention that the Loehr decision should be disregarded; and that the decision below should be review by this Court.

C. The Appellate Court's Interpretation Of The "Good Faith" Requirement Is Contrary To Established California Law.

The court below held that Petitioner met the first and second prongs for the application of the doctrine of equitable tolling; namely timely notice and lack of

prejudice to the defendant. Ervin, supra., at 6882. However, it also held that Ervin did not satisfy the last prong of the test in that she "failed to show that she acted reasonably and in good faith by delaying the filing of her federal civil rights action beyond the statutory limitations period." Id. Such a holding is contrary to established California authority.

In Jones, supra., the California Supreme Court held "that the running of the statute of limitations period is equitably tolled when an injured person has several formal remedies and reasonably and in good faith pursues one." Jones, at 108. (Emphasis added.) Thus, the focus of the Jones decision is on the plaintiff's good faith in pursuing the first action and not on the timeliness or alleged dilatory conduct in

instituting the second action.

In this case, Ervin had several remedies, the state tort claims and the federal claims. She reasonably pursued her state claims before filing the present federal action. The court below incorrectly examined Petitioner's conduct in filing the second suit, and not her conduct in pursuing the first action. Such analysis is unsupported by California law.[4]

Likewise, in Addison, supra., the California Supreme Court focused on the plaintiff's conduct in pursuing the first claim. The Court held that it has

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[4] Ervin concedes that this analysis is contrary to the good faith requirement as set forth in Loehr. However, Ervin contends that Loehr should not be utilized to interpret or modify Jones, or other Supreme Court authority, especially where that Court was crystalline in its holding and legal analysis.

adhered to a general policy which favors relieving plaintiffs from the bar of a limitations statute when, possessing several legal remedies he [or she], reasonably and in good faith, pursues one designed to lessen the extent of his [or her] damages. Addison, 21 Cal.3d at 317. Clearly, the focus of the good faith conduct analysis is on plaintiff's actions in pursuing the first action, not the second. Therefore, the Court below should have only examined Ervin's conduct in pursuing her state claims.[5]

Finally, in Elkins, supra., the

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5 A second and implicit factor of good faith may arise where plaintiff dismisses the first case and subsequently files a second case. There the Court might examine the lapse of time between the dismissal and second filing regarding the good faith requirement. However, this is not applicable in the case at bar since Ervin filed her federal claim while the state action was still pending.

Supreme Court held that the statute was tolled "when an injured person has several legal remedies and, reasonably and in good faith pursues one." Elkins, 12 Cal.3d at 414. Thus, it is clear that the California Supreme Court's analysis of good faith has focused on the conduct of prosecuting the first claim, and not the second.[6]

In summary, the Court should grant this Petition for Review in order to

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6 Ervin recognizes that this analysis may be contrary to subsequent intermediate appellate cases such as Loehr, supra. However, Ervin contends that the California Supreme Court's test of good faith has been tried and true since Bollinger, supra, in 1944, through Elkins, supra., in 1974, Addison, supra., in 1978 and Jones, supra., in 1980 and that cases such as Loehr have confused and misapplied the correct test. There are other intermediate appellate cases in accord with Jones and Addison. See Myers v. County of Orange, 6 Cal.App.3d 626, 634 (1970); Anderson v. City of Los Angeles, 30 Cal.App.3d 219 (1973).

carefully consider the Ninth Circuit's application of state law as applied in Federal Civil Rights cases.

III. The Decision Below Should Be Reviewed Because It Is Contrary To Earlier Ninth Circuit Decisions On The Same Issue.

The seminal case in the Ninth Circuit on California's equitable tolling doctrine is Ret. Clerks Union Loc. 648 v. Hub Pharmacy, 707 F.2d 1030 (9th Cir. 1983). There, the Court applied a liberal application of the good faith test where there was a three year lapse between actions. Specifically, the Court held that:

> California equitably tolls the statute of limitations during the pendency of an earlier action if there is "timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of plaintiff." Jackson v. Hayakawa, 605 F.2d 1121, 1127

(9th Cir. 1979), cert. denied, 445 U.S. 952, 100 S. Ct. 1601, 63 L.Ed.2d 787 (1980) (quoting Addison, 21 Cal.3d 313, 319, 578 P.2d 941, 943-944, 146 Cal.Rptr. 224, 227 (1978). The two actions need not be identical. See Elkins, 12 Cal.3d 410, 413, 525 P.2d 81, 83, 115 Cal.Rptr. 641, 643 (1974) (personal injury action followed worker's compensation claim).

Ret. Clerks Union, at 1033.[7] (Emphasis added.)

In that case, a Union sued Hub Pharmacy pursuant to the National Labor Management Relations Act, in order to enforce a collective bargaining agreement. The complaint was filed more than four years after the agreement expired. However, intervening administrative proceedings were held before the National Labor Relations Board. Id. at 1032.

The Court focused on the reasonable

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7 Also in accord, Mayes v. Leipzinger, 729 F.2d 605, 608 (9th Cir. 1984).

and good faith conduct requirement. The Court interpreted that this required reasonable and good faith at the time of the filings of both proceedings. Ret. Clerks Union, at 1036. Since Hub did not argue that the Union acted improperly in filing the first action, the first requirement of reasonable good faith conduct was met.

Hub, however did argue that the Union acted unreasonably or in bad faith by filing the second action. But the Court found that the Union did not act unreasonably in filing the second action even though there was a three year lapse between the actions. The Court reasoned that the Union tired to avoid duplicative proceedings which are ineffective, and awkward; citing Elkins. Id. at 1037. Thus, the Court held that the statute had been equitably tolled and that the second

action was not time-barred.

Similarly, Ervin acted reasonably and in good faith in the filing of both actions. As in Ret. Clerk's Union, Ervin automatically satisfies the reasonable and good faith conduct requirement in the filing of the state court complaint because the County did not challenge that conduct.

The County does, however, argue lack of diligence in pursuing the federal civil rights claim. However, such an argument misses the mark. The case law requires Ervin to reasonably and in good faith file the second claim soon after the first is dismissed. Ret. Clerk's Union, at 1034-35. Here, Ervin filed the second claim before the first complaint was dismissed. Petitioner's conduct arguably was even at a higher standard than required by the case law. The

decision below, therefore, should be reviewed because it is contrary to established appellate precedent.

IV. The Decision Below Should Be Reviewed Because It Is Unfair Since It Bars Petitioner From Asserting Important Federal Statutory And Constitutional Claims.

The doctrine of equitable tolling fosters our legal policy which favors the avoidance of forfeitures and allowing good faith litigants their day in court. Addison, 21 Cal.3d at 320-321. The decision below is contrary to that basic legal premise.

If the decision is allowed to stand, Ervin will effectively be barred from asserting any claims for the grievous injuries she and her son suffered. Her state court claims may effectively be barred by California's protection of its entities and agents through the immunity

action was not time-barred.

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If the decision is allowed to stand, Ervin will effectively be barred from asserting any claims for the grievous injuries she and her son suffered. Her state court claims may effectively be barred by California's protection of its entities and agents through the immunity

statutes.[8] Indeed, one of the primary Congressional purposes of growing actions pursuant to federal law (i.e. 42 U.S.C. section 1983) was to provide oppressed black citizens with redress against immune state actors. Wilson, 471 U.S. at 276-278 citing Cong. Globe, 42 Cong., 1st Sess. 374 (1871). See also Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625 (1983) (Allowing a prisoner who was raped and beaten in his cell to pursue a section 1983 claim for punitive damages.) Thus, the decision below deprives Petitioner of important Constitutional and statutory rights.

Further, procedural practice must be able to withstand the charge that it is

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8 Generally, California's Tort Claims Act provides immunity to a public entity where an injury to a prisoner is proximately caused by another prisoner. See Cal. Gov. Code section 844.6(a)(1), (2), et. seq.

inequitable. Elkins, 12 Cal.3d at 429, fn. 9. In this case, the County's motion to dismiss is the inequitable procedural practice which must be avoided; cases should be decided on their merits. The County claims it would be prejudiced if Petitioner is allowed to pursue her claims. But the fact of the matter is, that the County has always had the opportunity to seek and gather the evidence locked behind its jail-house doors. This Court, therefore, should not permit this type of unfair procedural practice. If Petitioner's claims should be dismissed let them be dismissed on the merits after she has had her day in court.

In addition, the County was in the best position to avoid the injuries sustained by Spears and his mother. Spear's assignment to C-Row cell block

was done with the knowledge that such an assignment would subject him to a vicious attack. (Mr. Spears was not a member of the infamous gang which controlled C-Row cell block.) Economic policy, therefore, dictates that the best cost avoider should bear the burden. In this case, that burden rests with the Respondent County.

The application of the doctrine in this case secures the benefits of the statute of limitations for defendants without imposing the costs of forfeiture on plaintiffs, like Mrs. Ervin and her son. After all, we are concerned with a delicate balance of law, equity and policy. This case emphasizes the numerous reasons why the scales tip in Petitioner's favor. Thus, in the interest of justice and fair play the

decision below should be reviewed by this Court.

CONCLUSION

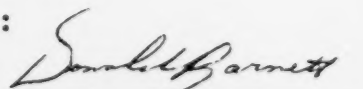
For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully

Submitted,

Donald Barnett, Esq.
Vincent W. Davis, Esq.

Law Offices of Donald Barnett
1801 Century Park East
Suite 1212
Los Angeles, California 90067
Counsel for Petitioner, Mrs. Aline Ervin

By: 

Donald Barnett

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALINE ERVIN, *Plaintiff-Appellant,* v. COUNTY OF LOS ANGELES, a chartered governmental entity, *Defendant-Appellee.*	No. 87-5871 D.C. No. CV 86-6429 DT (Kx) OPINION

Appeal from the United States District Court
Central District of California
Dickran Tevrizian, Jr., District Judge, Presiding

Submitted April 13, 1988*

Filed June 13, 1988

Before: M. Oliver Koelsch, John F. Kilkenny, and Jerome Farris, Circuit Judges.

Opinion by Judge Kilkenny

SUMMARY

Courts and Procedure/Statutes of Limitation

Appeal from judgment dismissing civil rights claim based on running of applicable statute of limitations. The court affirmed finding equitable tolling of the statute of limitations inapplicable.

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

Appellant Aline Ervin argues that the statute of limitations relevant to her federal civil rights action was equitably tolled by virtue of her previously having filed a tort claim action in state court.

[1] Equitable tolling is inapplicable to a situation in which a plaintiff who allegedly suffered several different wrongs pursues only *one* remedy as to *one* of those wrongs. [2] Because Ervin elected to pursue only one remedy as to one distinct wrong, the district court did not err in holding that the statute of limitations relevant to the appellant's federal civil rights action had not been equitably tolled by her previous filing of the state tort claim action. [3] Even if this court agrees with Ervin's contention that her state and federal claims were not legally distinct wrongs, however, this court would still decline to apply equitable tolling to these facts.

COUNSEL

Donald Barnett, Los Angeles, California; William H. Ford, III, Vincent W. Davis, Los Angeles, California for the plaintiff-appellant.

J. Patrick Joyce, Deputy County Counsel, Los Angeles, California for the defendant-appellee.

OPINION

KILKENNY, Senior Circuit Judge:

Aline Ervin ("appellant") appeals from the dismissal of her civil rights action for failure to state a claim upon which relief could be granted, based on the running of the applicable statute of limitations. We review *de novo, see Schlegel v. Bebout,* 841 F.2d 937, 941 (CA9 1988)(failure to state a claim); *Sheet*

Metal Workers, Local 150 v. Air Sys. Eng'g, Inc., 831 F.2d 1509, 1511 (CA9 1987) (statute of limitations), and we affirm.

The appellant argues that the statute of limitations relevant to her federal civil rights action was equitably tolled by virtue of her previously having filed a tort claim action in state court. This contention lacks merit.

[1] In order for a statute of limitations to be equitably tolled, there must be a showing of three things: first, that the plaintiff gave timely notice to the defendant of the plaintiff's claim; second, that the resultant delay did not cause prejudice to the defendant's position; and third, that the plaintiff acted reasonably and in good faith. *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (CA9 1988); *Addison v. State*, 21 Cal.3d 313, 319, 146 Cal.Rptr. 224, 227 (1978). As a general proposition, state law governs the application of equitable tolling to the statute of limitations in a federal civil rights action. *See Bacon*, 843 F.2d at 374 ("state law not inconsistent with federal policy") (*citing Board of Regents v. Tomanio*, 446 U.S. 478, 483-85 (1980)). A qualification to these general statements is that, under California law, which clearly controls on this point, equitable tolling is inapplicable to a situation in which "a plaintiff who allegedly suffered several different wrongs pursues only *one* remedy as to *one* of those wrongs." *Loehr v. Ventura Community C. Dist.*, 147 Cal.App.3d 1071, 1086, 195 Cal.Rptr. 576, 585 (1983)(pursuit of civil rights action in federal court did not equitably toll statute of limitations with respect to tort claims subsequently asserted in state court because, *inter alia*, state and federal causes of action unrelated and predicated on different wrongs)(emphasis in original).

[2] Here, although the procedural history of this case presents the flip side of the situation in *Loehr, supra*, we find compelling the California court's analysis of factually related state and federal claims as nevertheless constituting legally distinct

wrongs. Because the appellant elected to pursue only one remedy as to one distinct wrong, the district court did not err in holding that the statute of limitations relevant to the appellant's federal civil rights action had not been equitably tolled by her previous filing of the state tort claim action.

[3] Even if we agreed with the appellant's contention that her state and federal claims were not legally distinct wrongs, however, we would still decline to apply equitable tolling to these facts. Although the record reflects the giving of timely notice to the County of Los Angeles ("appellee") as well as a lack of prejudice to the appellee, the appellant failed to show that she acted reasonably and in good faith by delaying the filing of her federal civil rights action beyond the statutory limitations period. Our examination of the record reveals that the appellant had not only conducted an investigation of her own into the facts of this case, but had been in possession of a copy of the results of the appellee's own investigation file as well for perhaps as much as a year and a half prior to her filing the instant action in federal district court. While it is true, as Judge Pregerson pointed out in his dissent in *Bacon,* 843 F.2d at 375, that the California courts have not clearly defined "good faith" for purposes of determining the applicability *vel non* of equitable tolling, we conclude that, under the facts as presented here, "good faith" is to be used in its plain and ordinary sense, and that the appellant's unwarranted delay in filing her federal civil rights claim was neither reasonable nor in good faith.

The decision of the district court is AFFIRMED.[1]

[1]For the reasons set forth above, we need not and do not address the appellee's argument that the appellant lacked the capacity to bring this federal action on behalf of herself, her son, or his estate.

APPENDIX B

FILED
August 16, 1988
Cathy A. Catterson,
Clerk, U.S. Court
of Appeals.

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

ALINE ERVIN, Appellant, v. COUNTY OF LOS ANGELES, a chartered governmental entity, Appellee.	)	D.C. No. CV 86-6429 (Kx) C.A. No. 87-5871 ORDER

Before: KOELSCH, KILKENNY and FARRIS, Circuit Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for rehearing in banc, and Judges Koelsch and Kilkenny

recommended rejection of the suggestion for rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

APPENDIX C

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
J. PATRICK JOYCE, Senior Deputy County Counsel
648 Hall of Administration
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Los Angeles, California 90067

Telephone: (213) 974-1924

Attorney for Defendant
COUNTY OF LOS ANGELES

UNITED STATED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALINE ERVIN, Plaintiff, v. COUNTY OF LOS ANGELES, Defendants.	CASE NO: CV 86-6429 DT (Kx) ORDER DISMISSING FIRST AMENDED COMPLAINT

TO PLAINTIFF ALINE ERVIN AND TO HER ATTORNEYS OF RECORD DONALD BARNETT AND WILLIAM H. FORD, III:

On February 23, 1987, the Honorable Judge Dickran Tevrizian heard the motion to dismiss by defendant COUNTY OF LOS ANGELES and ordered the following:

1. Plaintiff's first amended complaint filed December 31, 1986 is dismissed with prejudice under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Approved as to form and content:

/s/ William H. Ford, III

WILLIAM H. FORD, III
Plaintiff's Attorney

DATED: March 25, 1987

IT IS SO ORDERED:

/s/ Dickran Tevrizian, Jr.

JUDGE DICKRAN TEVRIZIAN

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE DICKRAN TEVRIZIAN, JR., DISTRICT JUDGE PRESIDING

- - -

ALINE ERVIN,	)	
	)	
Plaintiff,	)	
	)	CV 86 6429
v.	)	
	)	
COUNTY OF LOS ANGELES,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
FEBRUARY 23, 1987

APPEARANCES:

FOR THE PLAINTIFF: WILLIAM H. FORD, III, ESQ.
ATTORNEY-AT-LAW
3580 WILSHIRE BLVD., SUITE 1700
LOS ANGELES, CA 90010
213/384-5880

FOR THE DEFENDANT: J. PATRICK JOYCE, ESQ.
SENIOR DEPUTY COUNTY COUNSEL
COUNTY OF LOS ANGELES
648 HALL OF ADMIN.
500 W. TEMPLE STREET
LOS ANGELES, CA 90012
213/974-1924

GARY BOND, CSR, RPR
U.S. COURT REPORTER
454 U.S. COURTHOUSE
312 SOUTH SPRING ST.
LOS ANGELES, CA 90012

LOS ANGELES, CA MONDAY, FEBRUARY 23, 1987

11:05 a.m.

***

THE CLERK: Item Number 12, CV-86-6429-DT, Ervin v. County of Los Angeles. Counsel, state your names for the record.

MR. JOYCE: Patrick Joyce for the defendant, County of Los Angeles and the County Counsel's Office and the moving party.

MR. FORD: William Ford for the plaintiff and opposing party, Your Honor.

THE COURT: All Right. This ia a motion by defendant, the County of Los Angeles, to dismiss the complaint. Now, let's go through the facts of this case, and I'll tell you what the tentative ruling is going to be: The present case is a civil rights action under 42 United States Code Section 1983 and arises from an assault and battery in the Los Angeles

County Men's Central jail on an inmate, Clifford Roy Spears.

The complaint alleges an attack by fellow inmates at the jail which allegedly occurred on February the 27th, 1983, and resulted in Mr. Spears death on March 7th, 1983, The plaintiff, Aline Ervin, is the mother of the decedent Spears. And the sole remaining defendant at the present time is the County of Los Angeles. By an order entered on January 26th, 1987, this Court dismissed plaintiff's original complaint that was filed on October the 3rd, 1986, and granted plaintiffs leave to file a "First Amended Complaint," which was filed on December 31, 1986.

In the previous order, parties stipulated that the 6 individual defendants, namely, Sherman Block, James W. Painter, William H. Alley, Ron C.

Block, T. Gingerich, and Marvin Washington were dismissed with prejudice. The sole cause of action contained in the "First Amended Complaint" is for a violation of 42 United States Code Section 1983 and Paragraph 15 of the "First Amended Complaint" which alleges in pertinent part as follows: "The statute of limitations otherwise applicable to this action has been tolled by plaintiff's timely filing of a prior action, Aline Ervin v. County of Los Angeles, et al., Case Number C-456-056 in the Superior Court of the State of California on or about June 8th, 1983, which was pending up to and including the date of the filing of the instant action."

Presently, the defendant now moves to dismiss the complaint pursuant to the "Federal Rules of Civil Procedure"

12(b)(6). I believe it is on the basis that the Statue of Limitations bars the action. The plaintiff has opposed the motion on the grounds that the running of the Statute of Limitations was equitably tolled in this case by the pendency of the plaintiff's earlier state court action.

Now, the prior state court action which was attached in the notice of the motion to dismiss the "First Amended Complaint" has been attached to Exhibit "A". And that is a complaint that was filed by the plaintiff's attorney Donald Barnett and was based upon the complaint for wrongful death, alleging negligence against the governmental entity for improper design, maintenance, and supervision of a penal institution which resulted in the death of an inmate as a result of beatings administered by fellow

inmates.

Now, prior to the United States Supreme Court decisions of Wilson v. Garcia, which was decided on April 17th, 1985, the applicable Statute of Limitations for a case involving 42 United States Code Section 1983, civil rights action, arising in California was 3 years from the date of the cause of action accrued; however, subsequent to Wilson v. Garcia, in which the Supreme Court stated that you look to the procedural law of the state in applying the Statue of Limitations to 42 United States Code Section 1983, this Court was involved in a similar situation, Ritrovato -- R-i-t-r-o-v-a-t-o -- v. Fierro, which was my case, CV-86-4501.

I previously ruled that a plaintiff whose 42 United States Code Section 1983 cause of action accrued before the Wilson

v. Garcia decision must file suit within the shorter period of either three years from the date that the cause of action accrued or 1 year subsequent to the date of Wilson v. Garcia. Again, the case is Wilson v. Garcia; was decided on April 19, 1985.

Now, in the instant case, the plaintiff's cause of action accrued on March 7th, 1983, and the plaintiff's original complaint in this case was filed on October 3rd, 1986. The original complaint that was filed in the Superior Court was filed on June 8th, 1983; and that was for a wrongful death action. This is for 1 that is arising our of 42 United States Code Section 1983. Both causes of action are different.

The tentative ruling in this case is to grant the present "Motion to Dismiss" with prejudice. I think that the

plaintiff has met one of the requirements necessary to invoke the equitable tolling and render the action timely filed and that is namely notice to the defendant in filing the earlier action; however, it appears that the plaintiff has not shown a lack of prejudice to defendant in gathering evidence to defend this action, because it's a different theory. Also the plaintiff has not demonstrated reasonable conduct in filing the 2nd action.

Again, this is a different theory from the 1st action. The first action was filed in state court, which was the wrongful death. This is an action which is for violation of the civil rights of the decedent. And in a wrongful death action, that action could be prosecuted in the name of the estate or in the name of the heirs. And under California law,

a dependent parent is an heir.

In the present action, there is a real question as to the capacity of the plaintiff in this particular case to bring a civil rights action in her own name as opposed to the estate of the deceased. Under California law, in order to invoke the equitable tolling to defeat a statute of limitations, there are 3 requirements that must be made and those are: 1. timely notice to the defendant in filing the 1st claim; 2nd, lack of prejudice to the defendant in gathering evidence to defend against the claim; and the 3rd is good faith and the reasonable conduct by plaintiff in filing the 2nd claim. There was a second claim in the second one also.

And there are cases that I reviewed. One of them is the Board of Regents v. Tomanio, T-o-m-a-n-i-o, 446 United States

478; Collier v. City of Pasadena, C-o-l-l-i-e-r, 142, Cal.App.3rd 917; and-- Addison A-d-d-i-s-o-n -- v. State of California, 21 California 3rd 313.

All right. With the tentative ruling in mind, let me hear from the plaintiff's counsel in this case.

MR. FORD: Your Honor, I'd like to go directly to what I understand to be the more specific observations of the Court; namely, the possibility of prejudice to the defendant County. I think this particular case demonstrates dramatically and perhaps under facts that I would be hard-pressed to even improve upon a very unique situation where the defendant moving party has at all times had a virtual lock on all the available evidence.

From February, 1983, continuously until today, it has been the case that

defendant County knew that it was being charged in some fashion with irresponsibility in connection with the death of Roy Spears. The common factual treads that are obviously interwoven between the state claim and the federal claim are that this boy was needlessly killed --assuming the allegations to be true -- and the somebody under the employment of the County dropped the ball and permitted this death. We are talking, I think, about a mere legal gloss that has now been placed ont his conduct. Earlier, it was asserted to be negligence. Now it is asserted to be a violation of 1983.

THE COURT: But they're mutually exclusive, the theories upon which the plaintiff in this case would seek to recover. And again, you have, I think, a capacity problem as to whether or not the

surviving heir on her own individual name can bring a civil rights action whether it's timely or not timely filed in her own name as against the governmental agency of the death of her son.

If she brought it in some type of a representation capacity, I think it wouldn't make any difference of what we are discussing here today. There is this question in my mind as of "capacity." Under the wrongful death statute, an heir dependant parent is an heir for purposes of the wrongful death statute and can prosecute the action in their own name or in the name of the estate.

MR FORD: Your Honor, I have to say that since the point was never raised in the moving papers, that I have not thought through the implications of Your Honor's remarks, particularly with respect to the issue of "capacity." It

is a point newly asserted by the Court, and certainly would have our consuming interest at a point in time that the County made that argument.

THE COURT: But it has a lot to do with the reasonableness of prosecuting the second claim, because if in fact the parties -- the capacities were all the same -- a different analysis would take place. But in this one, the one statute permits the dependent parent to sue directly; and the issue in this one is whether or not the statute permits the dependent parent to sue for alleged violation of civil rights of the deceased in this case by the governmental agency.

MR FORD: Your Honor, our understanding of the law is that the mother cannot pursue a 1983 action in that --

THE COURT: In an individual

capacity for the death of her son.

MR. FORD: I was not aware of that, nor has the point been argued previously. I would very strongly urge the Court to reserve ruling on that point and to permit us to brief that point because --

THE COURT: Let's just talk about the "timeliness" now, because the circumstance of whether or not the statute of limitations has expired in this case.

MR. FORD: With respect to the timeliness: I think the law is pretty clear under the Addison case and the Elkins v. Derby case and the Collier case, that the cause of action need not be the same. They simply have to be similar, and the focal point is of course whether or not the 1st claim adequately puts the defendant on notice of the 2nd claim. Here, I would have to disagree

with the Court that the claims are not mutually exclusive.

It could very well be the case that the County was negligent, and it could very well be the case that the County is guilty of a violation of 1983 conceptually. And I think it's in the highest traditions of the legal profession to put different theories on the same set of facts, especially when the case becomes as desperate as it became in the state court, due to the extraordinary labyrinth of immunity statutes which exist in the California Procedural system.

It is for that reasons that we're here, and it is for that reason that 1983, among other reasons, was probably contrived by Congress to avoid the almost draconian hardship that falls upon those claimants in the state court who are

confronted with, in this case, 8 or 9 immunity statutes.

The County literally and virtually knows everything about the circumstances of this regrettable tort case. The claimant before the Court knows virtually nothing about the circumstances. She wasn't an inmate. She was the mother of the inmate. So it follows that discovery, such as it is, will be a process of simply turn-over to the plaintiff. That's why I suggested to the Court that I could not sit down and contrive facts which would scream out for equitable tolling perhaps more than this case.

There is no showing and no suggestion of prejudice to the County. The fact of the matter is that the 1st claim certainly must have placed the County on notice to marshall its

evidence; to interview the personnel involved; to interview the inmates involved, all of which was of course accomplished and all of which has been pending for these several years. But I am convinced that this is a situation where liberality in applying the tolling rule ought to apply And I see, to be in the good company of the California Supreme Court which --

THE COURT: Former or current?

MR. FORD: That may be an astute observation, Your Honor. But the Court in the Elkins case did observe that, "when the notification purpose of the statute has been satisfied, then the trial courts are to liberally apply the tolling doctrine." One Court, as you may recall in the Collier case, even suggested that you don't even need 3 requirements. You

only need the second requirement: namely, the timely notice requirement.

And I don't suggest that we only have 1 requirement. I do suggest very strongly that we are perhaps placing technicalities over substance here. The allegation in the federal action speaks pretty much for itself" the continuity of the pending state court claims; the fact that we're talking a death that occurred on a very specific date in time. The only difference between case 1 and case 2, I respectfully submit --

THE COURT: Let's go back to the Elkins case that you cited, Elkins v. Derby, Cal.3d at 410 --

MR. FORD: Yes.

THE COURT: -- that's where the injured employee had filed a workman's compensation claim. And the California Supreme Court held that the Statute of

Limitations for the personal injury act was tolled during the period in which the plaintiff had unsuccessfully pursued this workman's compensation remedy.

In this particular case, you had a wrongful death matter filed by the dependant parent in her individual capacity, and the 2nd case is a denial of a civil right that the plaintiff in her own personal capacity has filed for the death of her son. And what I'm suggesting to you is that the --I don't think it's a real technicality we are dealing with. I think it's a substantial difference in legal theory and a substantial difference in capacities. As you're aware, the wrongful death statutes are laws and are statutes that were created by statute. And the Civil Rights Act is also a creation of a statute; and therefore, these statutes must be

strictly construed.

MR. FORD: Well, Your Honor they are to be strictly construed in certain contexts, but they are remedial statutes; and remedial statutes are to be given plenary literal construction. But Your Honor makes a good point, but perhaps my point has escaped you, with regard to the Elkins v. Derby case, you are correct. The case did involve a workman's compensation claim succeeded by a tort claim.

I think the important and the redeeming and the distinctive aspect of this case is that we are very much like the Elkins case, The Supreme Court in California said that even though fault was not involved in the worker's compensation case, still nonetheless, equitable tolling fully applied. In that case, plaintiff was permitted to go

forward with his tort case.

We're very similar here, because the County has argued eloquently that we're now -- that there is a greater element of fault. And without being facetious, I think Elkins says, "So what? You still have been charged with the same factual gravamen." And sine 1983, the marching order has been to get your evidentiary act together, And I think that's the teaching of all of the equitable tolling cases. And I sincerely urge the Court to appreciate the lack of prejudice to this moving party and enormous prejudice caused by the forfeiture to the plaintiff in this matter.

THE COURT: There's also another case entitled Loehr -- L-o-e-h-r v. Ventura County Community College District cited 147 Cal.App.3rd 1071, which was rendered after the Collier case that

discussed earlier. And in the Loehr case the appellate court held that a federal civil rights action in a federal court did not equitably toll the Statute of Limitations to commence a subsequent stat court tort action. We have the reverse. They filed in the federal court, then they went to the state court. Here we have it filed in the State Court, and we're going into the federal court. I know that this is a drastic action that this Court's going to take, but in the analysis that I've made, I think that in reviewing the law and reviewing the paragraphs reviewing the causes of action which were originally filed and going through the requirements, in order to file for equitable tolling, that the decision I've made is a correct decision.

Now, that's why we have appellate courts: to test the decisions that the

trial judges feel are correct. Let me hear from the County.

MR. JOYCE: Briefly, Your Honor. The County of Ventura case that you just spoke of, that was our 1st point. We didn't have an equitable tolling situation here, because of the distinct character of the civil right versus negligence action. In fact, we did cite the Daniel case citing in fact that you can't go forward whatsoever. That's a 1986 case with negligence -- any form of negligence -- in a 1983 action.

The crux issue is a lack of diligence on the part of the plaintiff here. They did have a state court action for three-and-one-half years. They have done some discovery, not all of the facts -- we're not still holding all the facts. They have the complete investigative report in the matter and have had it, I

think, for over a year-and-one-half now. And I'll make that representation to the Court, because I've handled the file from the beginning. And they did nothing. These immunity statutes they're afraid of that they haven't been dismissed in he state court, yet have always been there through the entire focus of the action, yet they did not file a 1983 action.

THE COURT: All right. You may continue.

MR. JOYCE: Secondly, Your Honor, as to the prejudice angle, it's as Your Honor has pointed out, we contend that it's clear on its face from the complaint that when you switch boats in the stream, so to speak, from a negligence action now 3 or 4 years later to a deliberate action and a violation or certain conduct and practices which are required in a 1983 action that Los Angeles County was

engaged in 5 years ago which would not have been the focus of any, based upon the complaint and the claims of the plaintiff, we've been prejudices. And I'll submit it, Your Honor.

THE COURT: I am going to stand by the tentative ruling in this case, and I will grant the motion of the County of Los Angeles to dismiss under 12(b) and 12(b)(6). The County will have to prepare an order for my signature; have it approved as to form and content by opposing counsel and submit it to me.

MR. FORD: Thank you, Your Honor.

MR. JOYCE: Thank you, Your Honor.

[Whereupon the Court adjourned at 11:20]

APPENDIX E

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

United States Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 United States Code, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage,

of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 United States Code, Section 1988:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the

of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to an govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of

1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.